

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

PUERTO RICO TELEPHONE COMPANY, INC.,

Employer

and

Case 24-UC-241

HERMANDAD INDEPENDIENTE DE EMPLEADOS
TELEFONICOS, INC., (HIETEL),

Union/Petitioner

DECISION AND ORDER

On August 1, 2006, Hermandad Independiente de Empleados Telefonicos, Inc., (HIETEL), (Union or Petitioner), filed this Unit Clarification Petition seeking to accrete three Legal Affairs Officers into the professional and technical employee bargaining unit it has represented since it was certified by the Puerto Rico Labor Relations Board, in case F-91-5-D-92-93-1224 on February 10, 1985.¹

The Legal Affairs Officer position was created in December 2004 when Puerto Rico Telephone Company, Inc., (Employer or Company) restructured its legal and financial departments, resulting in the two existing Administrative

¹ At the hearing, the Petitioner offered an amendment to the case number and date of certification on the basis that they had been stated incorrectly in the attachment to the Petition. While the amendment offered by the Petitioner, and stipulated to by the Employer, states that the certification date is February 10, 1985, this is arguably contradicted by other evidence in the record, including Board Exhibit 2 which states: "The Petitioner-Union has represented a bargaining unit of professional and technical employees of the Employer since 1996. . . . The first collective bargaining agreement was in effect from October 23, 1996 to October 22, 1999." Since

Officers being reclassified as Legal Affairs Officers (LAO). In 2006, the Employer hired a third LAO. The former Administrative Officer position had been classified as “managerial” and had historically been excluded from the bargaining unit. Similarly, the current LAO position has been classified as an “exempt” position and characterized as “managerial” in internal and external job postings.

The Petitioner contends that it is appropriate for the Board to direct the inclusion of the LAOs in the existing unit because their job description lists duties that are similar to the ones historically performed by bargaining unit employees classified as either Translators or Legal Affairs Coordinators. The Employer urges dismissal of the Petition for three reasons: 1) It is inappropriate to accrete the LAOs into the existing unit because the Petition is untimely; 2) The LAOs must be excluded because they are managerial employees and/or closely aligned with management; 3) The Petitioner has failed to establish that the LAOs share a community of interest with the bargaining unit employees. The Employer further contends that Petitioner’s argument that the LAOs assumed some of the duties of the Translator and the Legal Affairs Coordinator classifications is without merit because the Translator classification became obsolete when the only employee so classified retired in 2003 and the Legal Affairs Coordinator classification has been obsolete for an even longer period.

I have considered the evidence and arguments presented by the parties on the accretion issues raised in this case, and, as discussed more fully below,

the date of certification does not effect my determination herein, I make no findings regarding the correct date of certification by the Puerto Rico Labor Relations Board.

find that the Petitioner has failed to meet its burden of establishing that the duties and responsibilities of the LAOs have been substantially changed from the duties performed by the predecessor Administrative Officer classification, which has historically been excluded from the bargaining unit. In the absence of such substantial changes, it is inappropriate to upset the established practice of the parties to exclude these employees from the bargaining unit. *Bethlehem Steel Corporation*, 329 NLRB 243 (1999); *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999); *Union Electric Company*, 217 NLRB 666, 667 (1975).

STATEMENT OF THE CASE

A hearing was held on August 23, 24, and 31, and September 19 and 21, 2007, in San Juan, Puerto Rico, before María Margarita Fernández, a hearing officer for the National Labor Relations Board, on the issues raised by the Union's Unit Clarification Petition filed under Section 9(c) of the National Labor Relations Act, as amended. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding, I make the following findings:

1. **Hearing and Procedures:** The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The Employer, the Puerto Rico Telephone Company, Inc., is engaged in providing local and long-distance telephone services and data transmission services to consumers in Puerto Rico. While the parties did not stipulate to specific financial information, I find that the record evidence relating to contracts for materials and services processed by the legal

affairs department establishes that the Employer annually derives gross revenue in excess of \$100,000 and during the same period purchases and receives goods, supplies and materials in excess of \$5,000 from points outside of Puerto Rico. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. **Claim of Representation:** The labor organization involved, Hermandad Independiente de Empleados Telefonicos, Inc., (HIETEL), is a labor organization within the meaning of the Act. The parties stipulated that this labor organization represents certain employees of the Employer.

4. **Statutory Question:** Based upon the record evidence, no clarification of the existing bargaining unit within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act is warranted.

BARGAINING HISTORY

The parties stipulated and I find, that the Union has represented a professional and technical employee bargaining unit certified by the Puerto Rico Labor Relations Board since 1996. This bargaining relationship has been embodied in three successive collective bargaining agreements (CBAs or CBA), the most recent of which was executed by the parties on April 15, 2004, and is in effect by its terms from January 1, 2004 through December 31, 2008. The actual CBA was not admitted into evidence, nor was any evidence presented regarding which classifications are specifically included or excluded beyond the discussion of certain legal department positions at

issue in this case. However, there is no dispute that the Administrative Officer classification which preceded the creation of the LAO classification was excluded from the bargaining unit, or that certain other legal department classifications discussed below, including the Legal Officer (Law Clerk, Paralegal), Operations Services Coordinator, Translator, and Legal Affairs Coordinator classifications, were historically included in the bargaining unit.

PUERTO RICO TELEPHONE COMPANY'S ORGANIZATIONAL STRUCTURE

In 2004, the Employer undertook a reorganization of its legal and financial departments. This culminated in written notification to the two existing Administrative Officers that effective January 31, 2005, they would be classified as Legal Affairs Officers. The reorganization resulted in the legal department being placed under the administrative oversight of the Vice President of Corporate and Legal Affairs who oversees five departments: Human Resources and Administration, Labor Affairs, Regulations, Benefits and Compensation, and Legal Affairs. The Vice President of Corporate and Legal Affairs is Attorney Roberto Garcia. Reporting to him are his secretary and the directors of the five departments under his authority. The three LAOs at issue here work in the Legal Affairs Department.

The director position for the Legal Affairs Department is currently vacant. The Legal Affairs Department is divided into three divisions: Security; Legal Affairs and Corporate Contracts; and Legal Affairs, Opinions, and Litigation. There are no LAOs in the Security division, one LAO in Legal Affairs and

Corporate Contracts Division, and two LAOs in the Legal Affairs, Opinions, and Litigation Division.

A. Legal Affairs and Corporate Contracts Division

The manager of this division is Attorney Juan Deliz. Reporting to him are his secretary; one attorney, Madeleine Reifkohl; LAO, Wanda Fussa; and one bargaining unit employee, Service Operations Coordinator Idys Jimenez. This department is responsible for negotiating, drafting, and administering contracts and subcontracts entered into by the Employer for purchases of goods, materials, services, and property. This department also works with in-house and outside counsel on discovery matters and on developing defenses to lawsuits against the Employer relating to contracts.

B. Legal Affairs, Opinions, and Litigation Division

The manager of this division is Attorney Eliseo Ortiz Rivera. Reporting to Attorney Ortiz Rivera are three attorneys, three legal secretaries, two LAOs, Miguel Arrieta and Hugo Fuentes Pena, and one bargaining unit Legal Officer (also referred to as “paralegal” or “law clerk”), Hector Camacho Rodriguez. This department is responsible for instituting or defending State or Federal lawsuits involving property damage; third party lawsuits involving damages where there is no insurance coverage; defending the Employer before administrative agencies; filing and processing collection cases, and coordinating the defense of lawsuits by the Company’s insurers.

C. Inception of the LAO position

Human Resources Officer Edwin Mejias Rios is responsible for creating, updating, merging and eliminating job classifications for the Employer. His duties include drafting new job descriptions, including the LAO job description at issue herein. As part of the 2004 Company reorganization, Rios was given the parameters for the new LAO classification and instructed by the Director of Human Resources to redact the job description for the LAO classification based on those parameters. In preparing the LAO job description, Rios reviewed the existing job descriptions for attorneys, Administrative Officers (the position formerly held by the LAOs), and paralegals. He testified under cross examination that he did not review the job descriptions for the bargaining unit classifications of Legal Affairs Coordinator or Translator because these classifications were obsolete.

The initial LAO job description took effect December 1, 2004. By letter dated January 24, 2005, the Vice President of Legal Affairs informed Administrative Officers Wanda Fussa and Miguel Arrieta, the only two holding that job position, that effective January 31, 2005, they “will be transferred to the position of Legal Affairs Officer, in the Legal Affairs Department,” pursuant to a Company-wide reorganization prompted by changes in the telecommunications industry. According to LAO Fussa, the only change that occurred in her duties and responsibilities following the reorganization was the elimination of her supervisory functions. Although the record does not include any evidence regarding the extent of LAO Fussa’s prior supervisory duties, but clearly

establishes, as discussed more fully below, that her duties relating to responsibility over all of the Employer's contractual obligations remained the same as when she was classified as an Administrative Officer.

In April 2006, Rios reviewed the LAO job description prior to the Employer's internal posting of the position to allow current employees to bid because the Employer wanted to add a third LAO to its staff. The LAO job description was updated effective April 25, 2006 to add responsibilities for assisting with the planning and control of department budgets and maintaining control of damage claim invoices. The position code was updated on May 3, 2006 to reflect that the position was classified as an "exempt" "professional" position, rather than an "office personnel" position, pursuant to classification requirements of the Equal Employment Opportunity Commission. The record reflects that the internal LAO job posting was from April 27 through May 3, 2006. The posting specifically characterized the LAO position as "managerial." Paralegal Camacho applied for the position but was informed in writing that while he met the qualifications, he was not selected. Following the internal posting period, the Employer advertised the position to the general public from May 10 to May 19, 2006. This outside posting also characterized the position as managerial. The Employer finally selected Hugo Fuentes to fill the position in early August 2006.

D. Legal Affairs and Corporate Contracts LAO

As noted, there is only one LAO in this division. LAO Wanda Fussa is responsible for drafting contracts, maintaining the Employer's contract registry

directory, being the custodian of confidential contracts, registering property deeds, performing title searches, participating with in-house or outside counsels in the discovery process, including responding to interrogatories, and participating in developing the Company's defense strategy in civil lawsuits. In the 2004 reorganization, the contract registry directory actually became part of the finance department, so that LAO Fussa has access to the Employer's secure financial computer systems. Once a contract is registered in the system, LAO Fussa reviews and approves it. She then generates a purchase order which she forwards to the disbursement department for payment. LAO Fussa also has the authority to cancel a contract if, upon review, the language entered into the computer system does not conform to what she has determined to be appropriate.

The only bargaining unit employee in the Legal Affairs and Corporate Contracts division is Idys Jimenez, Operations Services Coordinator. The record is silent as to her duties and responsibilities, and her interaction with the other LAOs.

E. Legal Affairs, Opinions and Litigation LAOs

Prior to the reorganization in 2004, Miguel Arrieta was also classified as an Administrative Officer. His supervisor, Manager Ortiz testified that he had supervised Arrieta prior to the reorganization, and Arrieta's duties did not change in any respect after the reorganization. Arrieta, unlike Fussa, did not have any supervisory responsibilities before the reorganization. In a January, 2005 letter, Arrieta was notified that his job title had been changed to LAO. LAO Arrieta's

duties include coordinating all discovery procedures in insurance defense cases, assisting attorneys in the opinions and litigation division in all phases of tort damage litigation discovery, negotiating settlement payment plans in damages and collections cases, monitoring compliance and processing the payments received pursuant to such settlements. Arrieta also appears in court on behalf of the Employer to enforce settlements in default cases.

Because of the increase in the volume of work in this division, the Employer added a second LAO position in August 2006. Hector Fuentes Pena, the LAO hired, previously worked for the Employer on a services contract basis but was not performing any work for the company at the time he was hired in 2006. LAO Fuentes' duties and responsibilities include identifying documents in the computer system that correspond to damages outside the Employer's plants to wires, posts, cables, or telephone systems so that the case file can be assigned to attorneys for collections or litigation. LAO Fuentes also works directly with Opinions and Litigation Director Ortiz on non-litigation collection cases against the Employer including determining the status of the payment, investigating the facts surrounding the Employer's failure or refusal to pay, and contacting the third parties involved to determine their position on the matter. LAO Fuentes also reviews court judgments and prepares appropriate memoranda to ensure that the Employer is in compliance with the court order, or to assist the attorney in court appearances relating to said judgments. He also drafts letters in response to inquiries from governmental entities. Finally, LAO Fuentes spends about 20% of his time translating documents including

confidentiality agreements for upper management. As noted, the Employer eliminated the bargaining unit Translator position when the person holding it retired in mid-2003. The Translator position was eliminated because the need for translations had diminished significantly since the mid-1990s. LAO Fuentes has also intermittently assumed some of LAO Arrieta's duties because of Arrieta's recent illness.

The only bargaining unit employee in the Legal Affairs, Opinions and Litigation Division is Hector Camacho Rodriguez. He is classified as a Law Officer (also referred to as paralegal or law clerk) and is responsible for the law library. His duties include updating the various legal collection of books available in the library; providing attorneys with legal books and journals; researching issues and preparing memoranda based on said research, drafting court motions, court orders, and letters at the request of attorneys and subject to their revision; and drafting transmittal memos directed at the security department regarding compliance with subpoenas for customer telephone records. These subpoena transmittal memos are drafted under director Ortiz' signature and based on Ortiz' prior analysis and instruction.

Paralegal Camacho testified that his only work-related interaction with LAO Fussa is to deliver to her subpoenas or court orders which fall under her work jurisdiction. The record is silent as to the frequency or extent of such interaction. Paralegal Camacho further testified that he has no "professional" interaction with LAO Arrieta. The record is silent as to what, if any, interaction Paralegal Camacho has with LAO Fuentes.

LEGAL ANALYSIS AND CONCLUSIONS

A. Positions of the parties

The Union contends that it is appropriate to direct the inclusion of the LAOs into the historical unit because the LAOs perform job functions and have duties and responsibilities similar to those historically performed by Translators and Legal Affairs Coordinators which were bargaining unit positions. The Union further asserts that I should direct inclusion of the LAOs because the Employer has not met its burden of establishing that the LAO position “is so dissimilar to unit positions . . . to warrant exclusion from the unit.”² Finally, the Union disputes that the LAOs are managerial employees or so closely aligned with management to warrant exclusion.

The Employer contends that the instant UC Petition should be dismissed as untimely because the non-unit Administrative Officer position which preceded creation of the LAO position was in existence at the time the parties executed their most recent collective-bargaining agreement on April 15, 2004.³ The Employer further argues that it is not appropriate to direct inclusion of the LAOs because these individuals do not share a community of interest with bargaining

² Union’s post hearing brief at pages 1-2.

³ I find no merit to the Employer’s timeliness contention in light of the record evidence that the Employer’s reorganization resulting in creation of the LAO position became effective after the current collective bargaining agreement was executed. While I have found that the Petitioner has not met its burden of establishing that the changes have been substantial, that finding does not render the Petition untimely. See, e.g., *Bethlehem Steel Corp.*, 329 NLRB 243 (1999), cited by the Employer for the proposition that the Board will not entertain a unit clarification petition “unless the classification has undergone recent, substantial changes.”

unit employees because they are managerial employees or so closely aligned with management as to warrant exclusion.⁴

B. Legal Framework in Accretion Cases

In *Union Electric Company*, 217 NLRB 666, 667 (1975), the Board explained when accretion is appropriate:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or included—that they occupied in the past. **Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.** [Emphasis added.]

It is well settled that the Board follows a restrictive policy in finding accretions to existing bargaining units because it is reluctant to deprive employees of their basic right to select their own bargaining representative. Consequently, the Board will find a valid accretion only when the additional employees share an overwhelming community of interest with the preexisting unit to which accretion is sought. *ATS Acquisition Corp.*, 321 NLRB 712 (1996) and *Gitano Group, Inc.*, 308 NLRB 1172, 1174 (1992).

⁴ In light of my determination that the Petitioner has not met its burden of establishing that the LAO classification has been substantially changed from the Administrative Officer position which had been historically excluded from the unit, I make no findings regarding whether the LAOs, as a group, are managerial employees as defined by Board case authority.

The burden of establishing that unit clarification is warranted is on the party seeking the clarification, and that the Board will not lightly disturb historical bargaining units. In this regard, the Board in *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000), citing *Armco Steel, Co.*, 312 NLRB 257 (1993), stated:

Unit Clarification is appropriate for resolving, inter alia, ambiguities concerning the unit placement of employees in historical bargaining units following a reorganization of an employer's operations. In "compelling circumstances," the Board will clarify an historical unit into two units where the historical unit is no longer appropriate because of recent significant changes. Where the changes are not recent or significant, the Board will not disturb the parties' collective-bargaining history.

Similarly, in *Mayfield Holiday Inn*, supra, 335 NLRB 38, the Board stated:

The party challenging an historical unit bears the burden of showing that the unit is no longer appropriate. The evidentiary burden is a heavy one. [Citations omitted.]

Thus, the Board will not find accretion appropriate absent "compelling circumstances" that overcome the significance of bargaining history when an employer merges prior separate companies or internally reorganizes its own operations. See also, *Rock-Tenn Co.*, 274 NLRB 772 (1985); and *Union Electric*, supra, 217 NLRB 666, 667.

C. Framing the issues

While mindful of the positions of the parties and case authority cited in support of those positions, I find that the legal issue I must decide is whether the Petitioner has met its heavy burden of establishing that the LAO position has

undergone recent, substantial changes, warranting upsetting the historical exclusion of the classification from the bargaining unit.⁵

D. Findings of fact and conclusions of law

I find the proposed unit clarification to be unwarranted because the Petitioner has not met its burden of establishing that the LAOs have undergone much more than a name change to their prior Administrative Officer classification. In this regard, while LAO Fussa testified that she was relieved of supervisory duties as a result of the reorganization, the record is silent as to the nature and extent of those prior supervisory duties. Rather, LAO Fussa testified that her remaining duties are identical to those preformed before the reorganization and classification name change. Likewise, LAO Arrieta is performing duties identical to those he preformed as an Administrative Officer.

Thus, the record does not establish that there were work changes sufficient to “cast doubt on the continued exclusion” of this newly-named group of employees from the historical bargaining unit. In *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999), the Board cited *Union Electric* for this proposition and then stated:

Rather, a petition seeking to include a classification historically excluded raises a question concerning representation which can only be resolved through an election, or based on majority status. [Citations omitted.] The limitations on accretion . . . require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common

⁵ If I had found that such substantial changes had occurred, the Petitioner would also carry the burden of establishing that the LAOs now share such an overwhelming community of interest with the bargaining unit to warrant disturbing their historical exclusion. See e.g., *ATS Acquisition Corp.*, supra, and *Gitano Group, Inc.* supra. The record herein contains scant evidence regarding the community of interest factors required to make such findings, and in light of my determination that the classification at issue has not undergone substantial changes, I find it unnecessary to make any community of interest findings.

job-related characteristics distinct from unit employees. **It is the fact of historical exclusion that is determinative.** [Emphasis added.] Id at 914.

Similarly, in *Bethlehem Steel Corporation*, 329 NLRB 243 (1999), the Board stated:

[W]e find that the problem with the petition is not simply untimeliness. Rather, because the petition deals with positions that have historically been excluded from the bargaining unit, and have not been shown to have undergone recent substantial changes, it is a petition that the Board would refuse to entertain even if the existing collective-bargaining agreement were about to expire. . . . [*Union Electric* quotation and citation omitted.] Clarification is not appropriate, however, for upsetting . . . an established practice of such parties concerning the unit placement of various individuals.

Based on the foregoing, and the record as a whole, I find that it is inappropriate to direct inclusion of the LAOs in the historical bargaining unit. Accordingly, I shall order that the Petitioner's unit clarification petition be dismissed.

ORDER

IT IS HEREBY ORDERED that this Petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **December 10, 2007**. The request may not be filed by facsimile.

NOTICE OF ELECTRONIC FILING

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the enclosed Attachment supplied with this Decision and Order for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web center: www.nlr.gov.

Dated at San Juan, Puerto Rico, this 26th day of November 2007.

/s/

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